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No. 08-88

In The
Supreme Court of the United States

STATE OF VERMONT,

Petitioner,

vs.

MICHAEL BRILLON,

Respondent.

On Writ Of Certiorari
To The Vermont Supreme Court

BRIEF OF UTAH, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, MAINE, MASSACHUSETTS, MICHIGAN, MINNESOTA, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, VIRGINIA, WASHINGTON, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE..... 1

SUMMARY OF ARGUMENT 2

ARGUMENT..... 3

I. THE DECISION BELOW BLURS THE LINE THAT SEPARATES THE GOVERNMENT FROM PUBLIC DEFENDERS IN A CRIMINAL PROSECUTION..... 3

II. THE DECISION BELOW DRAWS A NEW LINE BETWEEN THE SPEEDY TRIAL RIGHTS OF INDIGENT AND NON-INDIGENT DEFENDANTS..... 8

CONCLUSION 12

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Barker v. Wingo, 407 U.S. 514 (1972) .....*passim*
Beavers v. Haubert, 198 U.S. 77 (1905) 1
Dickey v. Florida, 398 U.S. 30 (1970) 11
Doggett v. United States, 505 U.S. 647 (1992).....4
Ferri v. Ackerman, 444 U.S. 193 (1979).....5, 8
Klopfer v. North Carolina, 386 U.S. 213 (1967) 3
New York v. Hill, 528 U.S. 110 (2000).....10
Polk County v. Dodson, 454 U.S. 312 (1981) 5, 6
Strunk v. United States, 412 U.S. 434 (1973).....10
Tower v. Glover, 467 U.S. 914 (1984) 5
United States v. $8850 in United States Currency, 461 U.S. 555 (1983).....4
United States v. Cronic, 466 U.S. 648 (1984) 7, 8
United States v. Marion, 404 U.S. 307 (1971) 1, 4
West v. Atkins, 487 U.S. 42 (1988).....5

FEDERAL STATUTES

U.S. Const. amend. VI.....3, 5

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

ABA Standards for Criminal Justice: Prosecution and Defense Function 4-1.2(h) (3d ed. 1993) 9

ABA Standards for Criminal Justice: Providing Defense Services 5-1.6 (3d ed. 1992) 6

ABA Standards for Criminal Justice: Providing Defense Services 5-5.3 (3d ed. 1992) 7

Chief Justice Warren Burger, *Counsel for the Prosecution and Defense – Their Roles Under the Minimum Standards*, 8 Am.Crim.L.Q. 2 (1969) 8-9

R.P. Davis, *Waiver or Loss of Accused's Right to Speedy Trial*, 57 A.L.R.2d 30 (1958 and Supp. 2008) 10

Susan N. Herman, *The Right to a Speedy and Public Trial* 161 (Praeger 2006) 3, 11

INTEREST OF *AMICI CURIAE*

This Court has long recognized that a defendant's right to a speedy trial "does not preclude the rights of public justice." *Beavers v. Haubert*, 198 U.S. 77, 87 (1905). The Speedy Trial Clause instead "protects societal interests, as well as those of the accused." *United States v. Marion*, 404 U.S. 307, 330 (1971) (Douglas, J., concurring) (quotations and citation omitted). This Court's speedy trial jurisprudence therefore protects both "the rights of the accused" and "the ability of society to protect itself." *Barker v. Wingo*, 407 U.S. 514, 521 n.15 (1972) (quotations and citation omitted).

The decision below threatens this public interest by holding the government accountable for delays that are caused by public defenders in criminal prosecutions. As the primary officers entrusted with criminal justice in the United States, the *amici* States have a substantial interest in retaining their ability to prosecute cases without being held accountable for delays over which they had no control. If accepted by this Court, the Vermont Supreme Court's decision will compromise that ability.

SUMMARY OF ARGUMENT

In the opinion below, the Vermont Supreme Court held that delays caused by public defenders are attributed to the government for purposes of the speedy trial analysis. This decision is fundamentally flawed on two levels.

First, this decision blurs the line that separates the government from public defenders in a criminal prosecution. Though this Court's speedy trial jurisprudence has always distinguished between defendants and government actors, public defenders are not government actors. Like privately-retained defense counsel, public defenders represent the interests of their client, not the government, and therefore act as the adversaries of the government in a criminal prosecution. The actions of public defenders should not be attributed to the government for purposes of the Speedy Trial Clause.

Second, the decision below also draws a new line between the speedy trial rights of indigent and non-indigent defendants. If accepted by this Court, this decision would change the way prosecutors pursue cases against indigent defendants. Specifically, prosecutors would have an incentive to oppose requests for continuances that are filed by indigent defendants, and trial courts would have an incentive to deny such requests. The unintended consequence of this approach would be indigent defendants who are rushed to trial in order to avoid a violation of their redefined speedy trial right.

ARGUMENT

I.

THE DECISION BELOW BLURS THE LINE THAT SEPARATES THE GOVERNMENT FROM PUBLIC DEFENDERS IN A CRIMINAL PROSECUTION

The Sixth Amendment guarantees a defendant "the right to a speedy and public trial." U.S. Const. amend. VI. While the speedy trial right "does not have a fully documented historical pedigree," Susan N. Herman, *The Right to a Speedy and Public Trial* 161 (Praeger 2006), the amendment's known history supports the conclusion that its purpose is to constrain government actors, not defense counsel.

The right's "first articulation in modern jurisprudence appears to have been made in [the] Magna Carta." *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967). Following the Magna Carta, "[s]pecial writs and commissions were issued, under which the jails were cleared several times a year." Herman, *The Right to a Speedy and Public Trial* at 162. Thirteenth century "justices, armed with commissions of gaol delivery and/or oyer and terminer" then regularly visited the jails to provide "speedy justice" to the accused. *Klopfer*, 386 U.S. at 223-24. When justice was delayed, some officials were "sanctioned for detaining prisoners for too long, or without proper authority." Herman, *The Right to a Speedy and Public Trial* at 163.

This Court's speedy trial jurisprudence has accordingly focused on government actors. In *United States v. Marion*, 404 U.S. 307, 313 (1971), for example, the Court held that the Sixth Amendment speedy trial right "would appear to guarantee to a criminal defendant that the Government will move with the dispatch that is appropriate to assure him an early and proper disposition of the charges against him." In *Barker v. Wingo*, 407 U.S. 514, 527 (1972), the Court held that the speedy trial right applies to actions taken by "the State." This Court has subsequently concluded that *Barker* "developed a test to determine when Government delay has abridged the right to a speedy trial." *United States v. $8850 in United States Currency*, 461 U.S. 555, 564 (1983); *cf. Doggett v. United States*, 505 U.S. 647, 651 (1992) (noting that the speedy trial analysis focuses, in part, on "whether the government or the criminal defendant is more to blame for that delay").

In the decision below, however, the Vermont Supreme Court held that the Speedy Trial Clause can also be violated by public defenders. The court concluded that because "the defender general's office is part of the criminal justice system and an arm of the state," delays attributable to public defenders "must be attributed to the state," even if "most of the delay was caused by the inability or unwillingness of assigned counsel to move the case forward." Pet. App. 5, 27-28a.

The problem with this approach is that public defenders are not government actors. Nothing in the

text of the Sixth Amendment suggests that they are, and nothing in the Sixth Amendment's history suggests that they were originally regarded as such. *Cf. Tower v. Glover*, 467 U.S. 914, 921 (1984) (noting that the "first public defender program in the United States was reportedly established in 1914").

In other contexts, however, this Court has repeatedly held that public defenders are not government actors. In *Ferri v. Ackerman*, 444 U.S. 193 (1979), for example, the Court held that federal law does not immunize a public defender against suit for legal malpractice. The Court rejected the claim that a public defender has the same "responsibilities" as "other officers of the court" such as "the judge, the prosecutor, and the grand jurors." *Id.* at 202. Echoing *Barker*, this Court held that "[a]s public servants, the prosecutor and the judge represent the interest of society as a whole." *Id.* at 202-03; *cf. Barker*, 407 U.S. at 527 (holding that "society's representatives," not "the defendant," have an obligation to bring the defendant to trial). The public defender's "principal responsibility," however, is "to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the government and to oppose it in adversary litigation." *Ferri*, 444 U.S. at 204.

Far from being an agent of the government, a public defender actually has a "particular professional obligation . . . to be an adversary of the State." *West v. Atkins*, 487 U.S. 42, 52 (1988). In *Polk County*

v. Dodson, 454 U.S. 312 (1981), the Court therefore held that a public defender does not act under color of law for purposes of § 1983. The Court explained that a public defender "characteristically opposes the designated representatives of the State" and "serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing the undivided interests of his client." *Id.* at 318-19 (quotations and citation omitted).

The fact that public defenders rely on public funding does not change this. In *Polk County*, 454 U.S. at 321, the Court held that while the government's administrative decisions may affect "the quality of [a public defender's] law library or the size of his caseload," the public defender cannot become "the servant of an administrative superior." Instead, though public defenders are funded by the government, they must still retain the freedom to act as "the State's adversary." *Id.* at 322-23 n.13. The ABA's standards reflect this, stating that the "Government['s] responsibility to fund the full cost of quality legal representation for all eligible persons" should "[u]nder no circumstances" permit it to "interfere with or retaliate against professional judgments made in the proper performance of defense services." ABA Standards for Criminal Justice: Providing Defense Services 5-1.6 (3d ed. 1992).

The possibility that some public defender offices might be under-funded does not transform public defenders into government actors. Under ABA standards, public defenders already have an obligation to

"reduce their pending or projected caseloads" whenever "the acceptance of additional cases . . . will lead to the furnishing of representation lacking in quality or to the breach of professional obligations." ABA Standards for Criminal Justice: Providing Defense Services 5-5.3 (3d ed. 1992). If public defenders cannot do this, they are directed to "refus[e] . . . further appointments." *Id.* Once a public defender accepts appointment to a case, however, he has the same obligations as a privately-retained attorney. Inadequate funding does not transform his role in the adversarial system.

The critical issue is not the public defender's funding, but rather the public defender's position. *Barker*'s speedy trial analysis was predicated on the idea that "society's representatives" are charged with enforcing the government's speedy trial obligations. *Barker*, 407 U.S. at 527. Public defenders, however, are not society's representatives. They are not elected by the public or subject to retention elections. They do not have a duty to represent the public's interests, but instead only have a duty to represent their individual client's interests.

The decision below thus rests on the false premise that a public defender can simultaneously act as an arm of the state and an adversary of the state in the same proceeding. But the "very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *United States v. Cronic*, 466 U.S.

648, 655 (1984) (quotations and citation omitted). "[I]f the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *Id.* at 656-57.

Although the government funds public defender offices, it does not control public defenders. This Court should therefore reject the Vermont Supreme Court's assertion that the government can lose its ability to prosecute a criminal based on the "unwillingness" of a public defender to "move the case forward." Pet. App. 28a. The actions of public defenders should not be attributed to the government for purposes of the Speedy Trial Clause.

II.

THE DECISION BELOW DRAWS A NEW LINE BETWEEN THE SPEEDY TRIAL RIGHTS OF INDIGENT AND NON-INDIGENT DEFENDANTS

Prior to the decision below, public defenders and privately-retained defense counsel filled the same constitutional role. In *Ferri*, for example, the Court held that "the primary office performed by appointed counsel parallels the office of privately retained counsel." *Ferri*, 444 U.S. at 204. Chief Justice Burger observed that "defense counsel who is appointed by the court . . . has exactly the same duties and burdens and responsibilities as the highly paid, paid-in-advance criminal defense lawyer." Chief Justice Warren Burger, *Counsel for the Prosecution and*

Defense – Their Roles Under the Minimum Standards, 8 Am.Crim.L.Q. 2, 6 (1969). And under ABA standards, "[o]nce representation has been undertaken, the functions and duties of defense counsel are the same whether defense counsel is assigned, privately retained, or serving in a legal aid or defender program." ABA Standards for Criminal Justice: Prosecution and Defense Function 4-1.2(h) (3d ed. 1993).

The Vermont Supreme Court's decision changes this. As discussed above, the decision is premised on the assumption that because the government has an obligation to provide counsel to indigent defendants, a public defender is an "arm of the state" for speedy trial purposes. Pet. App. 5a. But the government does not have an obligation to provide counsel to non-indigent defendants. Privately-retained counsel therefore are not an arm of the state under the Vermont rule, and delays caused by privately-retained counsel would not count against the government for speedy trial purposes. The decision below thus creates different speedy trial rules for indigent and non-indigent defendants.

If accepted by this Court, this decision would change the way prosecutors pursue cases against indigent defendants. Prior to this decision, prosecutors could stipulate to a request for a continuance without fear of violating the defendant's speedy trial rights. In *Barker,* for example, the Court held that a defendant waives his right to a speedy trial if a "delay is attributable" to him. *Barker*, 407 U.S. at 529.

Lower courts have interpreted this to mean that a defendant waives his speedy trial right whenever he or his counsel stipulates to a continuance: "The fact that accused or his counsel consents or acquiesces to a continuance, or that his trial be set beyond the period prescribed by statute, is in effect a waiver of his constitutional and statutory right, and he may not complain that he was denied a speedy trial." R.P. Davis, *Waiver or Loss of Accused's Right to Speedy Trial*, 57 A.L.R.2d 302 § 9[a] (1958 and Supp. 2008).[1]

If delays that are requested by public defenders count against the government for speedy trial purposes, however, prosecutors and courts will have an incentive to oppose or deny such requests in order to avoid dismissal under the Speedy Trial Clause. *Cf. Strunk v. United States*, 412 U.S. 434, 438-40 (1973) (holding that the only remedy for a speedy trial violation is dismissal with prejudice). The unintended consequence of this approach will be indigent defendants who are prematurely rushed to trial in order to foreclose potential speedy trial claims.

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[1] This approach is consistent with this Court's jurisprudence in related contexts. For example, in *New York v. Hill*, 528 U.S. 110, 115 (2000), this Court held that a defendant's attorney can temporarily waive the defendant's statutory right to a speedy trial under the Interstate Agreement on Detainers. According to this Court, the "agreement by counsel generally controls" when dealing with "[s]cheduling matters" such as continuance requests. *Id.*

Ironically, this danger was foreseen by the only known objection to the Speedy Trial Clause during the original congressional debates. This objection "came from a Representative concerned lest trial be so speedy that an accused not have an opportunity to secure witnesses material to his defense." *Dickey v. Florida*, 398 U.S. 30, 41 n.2 (1970) (Brennan, J., concurring). Specifically, Representative Burke of South Carolina objected to the clause because of his concern that it would lead to "overly speedy proceedings" that would "disadvantage" the defendant. Herman, *The Right to a Speedy and Public Trial* at 166-67.

If the decision below is accepted by this Court, Representative Burke's fear would likely become a reality for indigent defendants. This would not only impair the rights of the defendants in such cases, but also those of society as a whole. *See Barker,* 407 U.S. at 521 n.15 (recognizing that a "requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself") (quotations and citation omitted).

But the Constitution does not require – and indeed may not even permit – the criminal justice system to try indigent defendants more speedily than non-indigent defendants. Rather than embracing this approach, this Court should instead hold that regardless of whether a defendant is represented by appointed counsel or privately-retained counsel, delays that are attributable to the defendant or his attorney

do not count against the government for purposes of the Speedy Trial Clause.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Vermont Supreme Court.

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